No. 15,584

United States Court of Appeals

For the Ninth Circuit

CHANAN DIN KHAN,

Appellant,

vs.

BRUCE G. BARBER, District Director, United States Immigration and Naturalization Service,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division.

Honorable Sherrill Halbert, Judge.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

I. INTRODUCTION.

This is an action brought by Chanan Din Khan, a resident of the United States since April 25, 1923, but a citizen of Afghanistan, pursuant to Section 10 et seq. of the Administrative Procedure Act, 5 USC 1009, and of the Immigration and Nationality Act of 1952, 66 Stat. 208, to have the Court review an order of defendant ordering him deported, to declare the same void, and to enjoin defendant from executing said order. The District Court had jurisdiction to hear the

matter and this Court has jurisdiction to review the judgment. *Shaughnessy v. Pedreiro,* 349 U.S. 48, 99 L. Ed. 868, 75 S. Ct. 591.

II. FACTS.

The essential facts are set out in the complaint and are not in dispute. Plaintiff is an alien, having entered this country from Afghanistan in 1923. On August 29, 1949, plaintiff's status in this country was adjusted and he was granted a Certificate of Registry. On January 4, 1954, this certificate was rescinded because in 1952 plaintiff had been convicted for Income Tax Evasion (26 USC 145 (b)) in the years 1946 and 1947.

Nothing else was done in the matter until May 2, 1956, when defendant filed an Order To Show Cause and Notice of Hearing upon plaintiff under the provisions of Section 242 of the Immigration and Nationality Act. On June 29, 1956, the hearing on the Order To Show Cause was held at San Francisco, California, before Monroe Kroll, Special Inquiry Officer of the United States Department of Justice, Immigration and Naturalization Service. Mr. Kroll ordered plaintiff deported.

An appeal from this order was duly taken to the Board of Immigration Appeals, which body, on August 31, 1956, upheld the Deportation Order. This action for judicial relief followed. The District Court ruled in favor of deportation.

III. ISSUES.

The primary issue in this case is whether plaintiff is a deportable alien under Section 241 (a)(4) of the Immigration and Nationality Act. There are two aspects of this broad question. These are: (1) Whether the conviction of plaintiff at a single trial of two counts of income tax evasion represented two crimes not involving a single scheme of criminal misconduct, and (2) whether income tax evasion is a crime involving moral turpitude within the meaning of the Immigration and Nationality Act, (3) whether Section 241 (a)(4) of the Immigration and Nationality Act when taken with Sec. 145(b) Internal Revenue Code affords a sufficiently definite standard upon which to base a deportation. We submit that the District Court incorrectly determined each of these issues.

IV. ARGUMENT.

A. PLAINTIFF'S CONDUCT INVOLVED A SINGLE SCHEME OR PLAN.

It is conceded that the very language of Section 1251 (a)(4) of the Immigration and Nationality Act makes it immaterial whether the two alleged crimes resulted in conviction of plaintiff at a single trial. The question in this regard is whether the two counts in the indictment were the result of a single scheme of criminal misconduct. The lawmakers must have anticipated the possibility of trials on a multiple count indictment, some involving a single scheme and others not. Unless we take this view, the exception in Section

1251 (a)(4) reading "not arising out of a single scheme of criminal misconduct" would be meaningless. In other words, the Congress foresaw that some such indictments would involve a single scheme of criminal misconduct, and others would not.

Assuming, for purposes of argument only, that plaintiff in 1946 hit upon a plan by which he would underestimate his income, and hence evade income tax, and meeting with some temporary success in that year he decides to continue his plan and underestimate the tax again. He would have had a single scheme or plan of criminal misconduct, even though the plan was a long range one and extended over two years. There was nothing multiple about the plan. There was but one plan. This does not mean that he could not (as in fact he was) be convicted of two crimes. Our point is that a single plan or scheme of criminal misconduct may result in a multiplicity of crimes, but it does not follow that there has been a like multiplicity of plans or schemes. If there has been but a single scheme or plan of criminal misconduct, Section 1251 (a)(4) has not been violated.

It is true that robbery of two different persons in one night, but at different times does not usually involve a single scheme or plan. On the other hand, several acts of theft by an official of county funds may involve a single plan or scheme. *State v. Brady,* 100 Iowa 191, 69 N.W. 290. Likewise, several successive abortive attempts to assassinate the President of the United States would result in many crimes but only one plan or scheme. *Norwitt v. U. S.,* 195 Fed. 2d 127.

The common sense test would seem to be whether evidence of the crime alleged in the first count of the indictment would be admissible in a prosecution under the second count. Since the theory of admissibility would be whether there was a plan or scheme, if such evidence could be admitted this would show that there was in fact only a single scheme.

There can be no doubt that evasion of income tax in a prior year may be used as evidence to show evasion in a subsequent year under the theory of common plan, scheme or design. This is especially true where in each instance the charge is merely that the tax was understated. See 20 *Am. Jur.* 296. In the case of *U. S. v. Sullivan,* 93 Fed. 2d 79, it was specifically held that evidence of tax evasion in one year is competent to prove tax evasion in a later year. It is true that ordinarily evidence of other crimes is not admissible to prove that the crime charged has been committed, but if there existed a common plan or scheme, an exception is made. It follows that evasion of income taxes for the year 1946 by understating the net income, and evasion of 1947 taxes by the same method represents but one scheme or plan. The scheme or plan to evade taxes is the central point, and it makes no difference that the scheme, once put into operation, was tried for several years.

It has never been easy to determine what is a crime involving moral turpitude. The Senate Committee drafting the Immigration and Nationality Act of 1952 faced the problem of deciding the meaning of the term. It recognized that many classes of crimes involve

it, while many do not. It referred to the case of *U. S. ex rel. Mylius v. Uhl,* 203 Fed. 152 (1913), and by implication accepted the definition given therein. The definition there given was that the act must be one showing the perpetrator to have personal depravity and baseness. It is said that the crime must of necessity involve moral depravity. In other words, all who commit the crime must be presumed to be vile, base and depraved. The case in question involved criminal libel. In analyzing this specific crime the Court said that there are times when criminal libel might show such depravity as to involve moral turpitude, but went on to point out that editors have been held guilty, even though they had no personal relationship with the published matter. Since some libels would involve moral turpitude and some would not, it could not be said that the "crime in its very nature, necessarily involves moral turpitude." See also: *Giglio v. Neely,* 208 F. 2d 337.

A taxpayer may be guilty of a violation of Section 145(b) of the Internal Revenue Code without personally preparing the return, or in fact having anything to do with it except furnishing certain figures to his bookkeeper. The taxpayer need not be depraved or immoral to be convicted. He can simply be negligent, or better still, too trusting in the belief that others will properly keep his records, make his return, and pay his tax. *Remmer v. U.S.,* 205 Fed. 2d 277.

The test seems to be that if acts of baseness or depravity are necessary for conviction, then the crime involves moral turpitude. It is the inherent nature of

offense which governs. *U. S. ex rel. McKenzie v. Savoretti,* 200 Fed. 546; *U. S. v. Carrollo,* 30 Fed. Supp. 3, involved an attempt to evade a tax. The Court said:

> "We are not prepared to rule that an attempt to evade payment of a tax due the nation or the commonwealth . . . , wrong as it is, and as unlawful as it is, is an act evidencing baseness, vileness or depravity . . ."

The Court went on to say that the answer must be found in the essential nature of the crime, and not in the skill of prosecutors in drafting pleadings.

It is true that violation of some tax laws necessarily involves moral turpitude. Violation of the narcotics tax laws is an instance of this. See: *Marcello v. Ahrens,* 212 Fed. 2d 830. The reason that violation of this law involves moral turpitude is that there is a moral purpose behind the law. The moral purpose is suppression of narcotics trade and drug addiction. There is no moral purpose in income tax law. The sole purpose of the Federal Income Tax Law is to raise revenue.

It is quite possible that some income tax evasion cases, because of surrounding facts and circumstances, may involve moral turpitude. Before, however, a deportation under Section 1251 (a)(4) Immigration and Nationality Act may result from conviction of a crime involving moral turpitude, the crime by its very nature must involve moral turpitude. *United States v. Neeley,* 208 Fed. 2d 337, 340-342; *United States v. Corsi,* 63 Fed. 2d 757, 759; *United States v. Day,* 51 Fed. 2d 1022; *United States v. McCandless,* 28 Fed. 2d 287.

Since the crimes of which it is alleged that plaintiff was convicted each involved a violation of Section 145(b) U. S. Internal Revenue Code, it becomes pertinent to explore further the question as to whether a violation of that law always involves moral turpitude. If an intent to defraud is an essential element of the crime, then it involves, necessarily, moral turpitude. *United States v. Day,* supra.

It is now the conclusively settled law of the land that a violation of Section 145(b) U. S. Internal Revenue Code does not necessarily involve fraud or moral turpitude. *United States v. Scharton,* 285 U.S. 518, 52 S. Ct. 416.

It is difficult to reconcile the *Scharton* case, supra, with the ruling of this Court in *Chu v. U. S.,* July 11, 1957 (not yet reported). Section 1114(b) of the Internal Revenue Act of 1926, like Section 145(b) of the Internal Revenue Code of 1939, under which appellant was tried and convicted, made it a felony for any person to willfully attempt in any manner to evade or defeat any tax imposed by this law. Scharton was indicted under Section 1114(b) of the 1926 Code, but the District Court quashed the indictment on the ground that fraud was not an essential element of the crime, and for that reason the longer statute of limitations provided in the fraud section of the statute did not apply. There, as here and in the *Chu* case the Government contended that fraud is implicit in the concept of evading or defeating a tax. The United States Supreme Court rejected this contention and held that the six-year statute of limitations applied only in cases

"in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense." The judgment quashing the indictment was affirmed.

Examination of the basis of the broad statement of the learned trial judge in this case to the effect that the Courts have held "with apparent unanimity", that a conviction under 145(b) requires proof of "a specific intent to evade taxation", amounting to an intent "to defraud the United States," produces an interesting result.

In the first place, the one case to the contrary, the *Scharton* case, supra, is not mentioned. What is more important, however, is the fact that the *Scharton* case is the only pronouncement by the United States Supreme Court on the subject. With all due deference and respect to them, we submit that none of the lower courts cited could have, under our judicial system, any power to overrule the United States Supreme Court.

Examination of the basis of the statement by the trial Court produces another interesting result. Footnote No. 5 of the opinion below ends *"Cf. Berra v. United States,* 351 U.S. 131." This case could hardly support the reasoning of the trial Court or give aid and comfort to the Government in this case. The *Berra* case holds that every tax evasion does not necessarily involve fraud because some are felonies and some are merely misdemeanors. It is stated that the facts required to prove the felony (145(b)) violation are "identical with those required to prove" the

misdemeanor (3616(a)). This amounts to a finding by the highest Court of the land that income tax evasion is at times a felony, and may involve moral turpitude, but at times it is a misdemeanor only, and no fraud or moral turpitude is involved.

If deportability is to be made to turn upon the caprice of a prosecutor in choosing whether to denominate the crime charged as 145(b) or as 3616(a), we then truly have government by men and not by law. Two aliens could file identical tax returns except as to name, for two years, and they could be false in identical particulars, and yet the prosecutor could call one a felony and charge violations of 145(b) and then proceed to deport his chosen victim, and charge the other with the misdemeanor (Section 3616(a)) and save the object of his official benevolence from the prospect of being thrown back upon shores long forgotten.

It is respectfully submitted that if deportability may be made to turn upon the whim or caprice of the prosecutor who drafts the indictment, a serious question as to the constitutionality of section 1251 (a)(4) of the Immigration and Nationality Act arises. If it is applied as urged here by the Government it is void for vagueness, and hence unconstitutional.

It is now the settled law of the land that deportation is such a harsh and drastic penalty that it will be treated as a forfeiture or penalty, and the rules applicable to testing criminal statutes for vagueness will be applied. *Fong Hau Tan v. Phelan,* 333 U.S. 6, 92 L. ed. 433, 68 S. Ct. 374. The test is whether the

statute "conveys sufficiently definite warning" to the actor as to the probable consequences of this act. *Connally v. Gen. Const. Co.,* 269 U.S. 385. The very word "warning" denotes notice in advance. How could appellant in this case have known in advance that he would be charged as a felon and be made subject to deportation, or whether he would be simply charged under Sec. 3616(a) and hence be convicted of two misdemeanors?

We submit that had appellant been charged under the misdemeanor section (3616(a)) his crime would not have been considered as one involving moral turpitude, since the "moral turpitude" crimes have been generally held to be felonies only.

V. CONCLUSION.

We are not "waving the flag" or pleading for sympathy when we respectfully repeat the truism that ours is a nation made up of immigrants and their offspring. Our country was founded and largely made great by the infusion into the mainstream of our national life a steady flow of men and women from the "four corners" of the earth. Ours is a fertile, prosperous and great land—in fact the greatest. It is truly "the land the Lord remembered."

But what has this to do with Chanan Din Khan? It has much to do with him. This Court is called upon to interpret a section of our immigration laws, and a section of our tax laws as it relates thereto. In making

these interpretations this Court should consider the fact that for nearly two hundred years ours has been the "open door", and we have entreated the world to send us its "teeming millions." We should not now so technically and restrictively interpret our laws, so as to fashion reasons and apparent justification for closing our "open door", or for sending back those who, though they have spent their useful and productive years with us, have erred in a fashion rather common to the native born. For the alien we say the usual penalites of fine and imprisonment are not cruel enough. We must now banish him! This is hardly in keeping with the American ideal of fair play for all regardless of race, nationality or place of birth.

The judgment below should be reversed.

Dated, Sacramento, California,
August 27, 1957.

Respectfully submitted,
COLLEY AND SAKUMA,
Attorneys for Appellant.